

THE LUCASVILLE REBELLLION

October 16, 2009
John Connor Presentation

I. Informants:

- A. Informant, Snitch or Witness?
- B. Situation defines the term
 - 1. Can a jail or prison inmate ever be a witness
 - 2. Status change once sentenced or incarcerated?

From *State v. Grimes*, 1999 MT 145 ¶¶ 41-48:

Grimes contends that the District Court erred when it failed to give his proposed instruction No. 18, which stated:

You have heard testimony that Steve Ortega, a witness, has received benefits, compensation, or favored treatment from the government in connection with this case. You should examine his testimony with greater caution than that of ordinary witnesses. In evaluating that testimony, you should consider the extent to which it may have been influenced by the receipt of benefits from the government.

...

Montana has no prior case law addressing cautionary instructions for "jailhouse informants." The proposed instruction which Grimes offered the District Court is patterned on Ninth Circuit Model Criminal Jury Instruction No. 4.10, and Grimes cites Ninth Circuit case law in support of his position.

...

We hold that when a government informant motivated by personal gain rather than some independent law enforcement purpose provides testimony, **a cautionary instruction is the more prudent course of action.**

We further hold that when a trial court refuses a proposed cautionary instruction, the standard of prejudice is whether the testimony was crucial to the State's case in light of other evidence. This standard is in accord with our jurisprudence on prejudice. (the

essential question is whether there is a reasonable possibility that the error might have contributed to the conviction).

There was no evidence, however, that he was motivated to testify by any "independent law enforcement purpose." Ortega's motivation notwithstanding, we conclude that the District Court's failure to give the requested cautionary instruction was harmless in this case.

From *State v. DuBray* 2003 MT 255 ¶¶ 52 - 55

Did the District Court abuse its discretion when it refused to allow expert testimony regarding the credibility of informants who are incarcerated?

At trial, the District Court excluded the testimony of DuBray's expert on incarcerated informants, Dr. Paul Lawson. In his offer of proof on the matter, counsel for DuBray stated:

With regard to . . . Dr. Paul Lawson, his information is in the nature of educational experience, educational material provided to the jury with regard to how the informant system works, and the problems that the criminal justice system has had over the course of the American Republic with regard to utilization of witnesses who have a benefit in the outcome, whether it's a reduction of charge or whether it's a payment specifically for [**390] witness testimony, relocation, however you want to couch it.

The District Court excluded this testimony because it would invade the province of the jury. The District Court reasoned that the concept of prisoners bartering information and testimony in exchange for favorable treatment is one that is generally understood in our society. The District Court noted further that DuBray had an opportunity to cross-examine witnesses with regard to possible motivations for giving untruthful testimony.

We agree with the District Court. The subject of Dr. Lawson's proposed testimony is one which jurors are capable of understanding without the assistance of expert testimony, as provided for in Rule 702, M.R.Evid. The District Court did not abuse its discretion by excluding Dr. Lawson's testimony.

From *State v. Giddings*, 2009 MT 61, ¶¶ 64- 69:

Gillette and Mulcahy both testified about statements Giddings made to them while they were in county jail.

...

Giddings argued that the District Court should not allow Gillette or Mulcahy to testify because both were jailhouse informants and because the State had failed to provide proper discovery. The District Court allowed both witnesses to testify at trial.

...

Giddings argues that allowing Gillette and Mulcahy to testify violated his right to a fair trial. Giddings points to the inherent unreliability of jailhouse snitches and argues that cross-examination does not protect adequately a defendant's rights.

The State challenges Giddings's depiction of Gillette and Mulcahy as jailhouse informants. The State suggests that a government informant is "motivated by personal gain rather than some independent law enforcement purpose." ... The State contends that this definition does not apply to Mulcahy or Gillette, because neither witness testified in return for inducements or other type of favorable treatment.

The appellant bears the burden to establish error by a district court. The appellant must establish such error with legal authority. *Bailey*, P 26. Giddings provides no evidence to refute the State's claim that Gillette and Mulcahy did not receive compensation or any other form of personal gain for their testimony. *Grimes*, P 45. Giddings also provides no legal authority to contradict the State's definition of jailhouse informant. *Bailey*, P 26.

II. Prosecutor's Duty to Pursue the Truth:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed,

he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88.

A. Preamble to Montana Rules of Professional Conduct: ***(1) A lawyer shall always pursue the truth.***

1. What is truth

2. “Justice” seems a more appropriate term

B. Rule 3.8, Rules of Professional Responsibility states the responsibilities unique to a prosecutor. The prosecutor shall:

3.8(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

C. Rule 3.6: Trial publicity (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

D. ***See ABA Standing Committee on Ethics and Professional Responsibility***

July 8, 2009 - Formal Opinion 09-454 - Prosecutor’s Duty to Disclose

E. ***See ABA Standards for Criminal Justice: Prosecutorial Investigations***

February, 2008: Standard 1.2 - Cooperation Agreements with cooperating witnesses:

As used in these Standards, “cooperation agreements” are agreements between the prosecutor and otherwise culpable

individuals or entities (“cooperators”) who provide the government with assistance useful to an investigation in exchange for benefits. A cooperator may have been a confidential informant earlier in the investigation.

- (a) The prosecutor should ordinarily seek to have the cooperator plead guilty to an appropriate criminal charge rather than provide the cooperator immunity for culpable conduct.
- (b) In deciding whether to offer a cooperator significant benefits, including a limit on criminal liability, immunity, or a recommendation for reduction of sentence, the prosecutor should consider whether:
 - (1) the cooperator is able and willing to provide valuable assistance to the investigation;
 - (2) the cooperator will maintain the confidentiality or secrecy of the investigation;
 - (3) the cooperator has biases or personal motives that might result in false, incomplete information.

III. Prosecutorial Misconduct

A. Remedies:

1. Measured by reference to established norms of professional conduct. *State v. Martin*, 2001 MT 83, ¶ 63, 305 Mont. 123, P63, 23 P.3d 216, P63 (citations omitted).
2. Misconduct by a prosecutor may form the basis for granting a new trial where the prosecutor's actions have deprived the defendant of a fair and impartial trial. *Clausell v. State*, 2000 MT 33, ¶ 11, 326 Mont. 63, 106 P.3d 1175, citing *State v. Gray* 673 P.2d 1262, 1265-66 (1985).
3. To demonstrate the trial court abused its discretion in denying a motion for a mistrial based on alleged prosecutorial misconduct, the defendant must show that the prosecutor engaged in misconduct and that the prosecutorial misconduct violated his substantial rights; ... Court will not presume prejudice. *State v. Longfellow*, 2008 MT 343, ¶ 25, 346 Mont. 286, 194 P. 3d 694.
4. Both the Sixth Amendment of the United States Constitution and Article II, Section 24 of the Montana Constitution guarantee criminal

defendants the right to a fair trial by a jury. A prosecutor's misconduct may be grounds for reversing a conviction and granting a new trial if the conduct deprives the defendant of a fair and impartial trial. *State v. Hayden*, 2008 MT 274, ¶ 27, citing *Clausell* and *Gray*.